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IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-810

JOSEPHINE MCGRAW, *et al.*,

Petitioner,

v.

STEPHEN BERGER, individually and as Commissioner of the New York State Department of Social Services, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No.

JOSEPHINE McGRAW, et al.,

Petitioner,

v.

STEPHEN BERGER, individually and as Commissioner of the New York State Department of Social Services, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner[1] prays that a writ of certiorari issue to review the judgment of the

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[1] Petitioner is JOSEPHINE McGRAW, individually and on behalf of her nine minor children and all persons similarly situated. Respondents are STEPHEN BERGER, individually and as Commissioner of the New York

United States Court of Appeals for the Second Circuit in the above styled case, which affirmed an order granting partial summary judgment against petitioner by the United States District Court for the Southern District of New York.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 537 F.2d 719 (1976) and is attached hereto as Appendix A. The opinion of the District Court for the Southern District of New York is reported at 410 F. Supp. 1042 (1976) and is attached hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals

State Department of Social Services, JAMES DUMPSON, individually and as Commissioner of the New York City Department of Social Services, and THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES.

for the Second Circuit was entered on July 2, 1976. A copy is attached hereto as Appendix C. A timely petition for rehearing was denied in an order entered on September 15, 1976. A copy is attached hereto as Appendix D. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

42 U.S.C. §§602(a)(7) & (8) and implementing regulations of the Department of Health, Education, and Welfare require that the first $30 and 1/3 of the remaining gross monthly earnings of a working recipient of Aid to Families with Dependent Children (AFDC) be "disregarded" in determining the need for and the amount of AFDC payments. ("$30 and 1/3 disregard"). Title 18 New York Code of Rules and Regulations (NYCRR) §352.31(d)(1)(ii) requires the withholding of the "$30 and 1/3 disregard" to recoup previous AFDC overpayments caused by agency

or non-willful recipient error. The questions presented are:

1. Whether 18 NYCRR §352.31(d)(1)(ii) violates 42 U.S.C. §§602(a)(7) & (8) and is therefore void under the Supremacy Clause of the United States Constitution?

2. Whether a District Court may refuse to certify a class pursuant to F.R.C.P. Rule 23(c) after having determined that all requirements of F.R.C.P. Rule 23(a), (b) (2) are fulfilled?

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS INVOLVED

Article VI, Clause 2 of the Constitution of the United States:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Title 18 New York Code of Rules and Regulations (18 NYCRR) Section 352.31(d)(1)(ii) appears in the official compilation of Codes, Rules and Regulations of the State of New York, Volume 18, Page 166.

18 NYCRR §352.31(d)(1)(ii):

> (d) Recoupment of overpayments.
> (1) Except as provided in paragraph (2) of this subdivision, recoupment of overpayments of assistance including overpayments resulting from assistance paid pending a hearing decision shall be treated as follows:
> (ii) Recoupment of any overpayment made to a recipient shall not be required unless the recipient has currently available income or resources, exclusive of the current assistance payment. Exempted income and disregards shall be considered as being currently available.

Social Security Act §402(a)(8)(A), 42 USC §602(a)(8)(A):

> (a) A State plan for aid and services to needy families with children must
> (8) provide that, in making the determination under clause (7), the State agency--
> (A) shall with respect to any month disregard--
> (i) all of the earned income of each dependent child receiving

aid to families with dependent children who is (as determined by the State in accordance with standards prescribed by the Secretary) a full-time student or part-time student who is not a full-time employee attending a school, college, or university, or a course of vocational or technical training designed to fit him for gainful employment, and

(ii) in the case of earned income of a dependent child not included under clause (i), a relative receiving such aid, and any other individual (living in the same home as such relative and child) whose needs are taken into account in making such determination, the first $30 of the total of such earned income for such month plus one-third of the remainder of such income for such month (except that the provisions of this clause (ii) shall not apply to earned income derived from participation on a project maintained under the programs established by section 632(b)(2) and (3) of this title); and

Social Security Act §402(a)(7), 42 USC §602(a)(7):

> §602 State plans for aid and services to needy families with children; contents; approval by Secretary
> (a) A state plan for aid and services to needy families with children must

> (7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income;

45 Code of Federal Regulations (CFR) §§233.20(a)(3)(ii)(A) & (b), 233.20(a)(7), 233.20(a)(12)(i), proposed 45 CFR §235.15, 41 Fed. Reg. 8067-8068, and Federal Rules of Civil Procedure 23(a), (b)(2) are set forth in pertinent part in Appendix E.

STATEMENT OF THE CASE

Petitioner Josephine McGraw has worked for the last four years as a cook's helper. Before she began working, Ms. McGraw and her nine minor dependent children were

completely supported by a grant of Aid to Families with Dependent Children ("AFDC"), 42 USC §601 et. seq. Presently, Ms. McGraw's family of ten is supported by her earnings and a supplementary grant of AFDC administered by respondents.

Eligibility for AFDC is determined by comparing a family's "available" income with a Statewide standard of need related to family size. New York Social Services Law §131-a; 42 USC §602(a)(7). If "available" income is less than the Statewide AFDC payment standard, the deficit is paid as an AFDC grant. Social Services Law §131-a 2. New York's Statewide "need" and payment standards are now identical, but they need not be, and were not prior to 1974 when the payment standard was set at 90% of "need". Rosado v. Wyman, 397 U.S. 397 (1970); Jefferson v. Hackney, 406 U.S. 535 (1972).

Prior to July 1969 the Social Security Act ("the Act") required only that the income

of working recipients be supplemented up to the level paid in outright grants to non-working AFDC recipients. In 1968, 42 USC §§602(a)(7) & (8) (pages 5-7, supra) were amended to require the States to disregard the first $30 and 1/3 of the remainder of a working recipient's monthly earnings ("$30 and 1/3 disregard")[2]. This provision was enacted to provide an incentive for AFDC recipients to find and retain gainful employment. Senate Report No. 744, 90th Cong. 1st Sess. (1967), 1967 U.S. Code Cong. and Admin. News, pp. 2981, 2982, 2994, 2995. 42 USC §§602(a)(7) & (8) and the implementing regulations of the Department of Health, Education, and Welfare ("HEW"), 45 CFR

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2. 42 USC §602(a)(8)(A)(i) requires the disregard of "all of the earned income of each dependent child" receiving AFDC who is a student and not a full time employee. The challenged regulation also authorizes recoupment of these "disregarded earnings." Working recipients subjected to recoupment from §602(a)(8)(A)(i) earnings are within the purported class.

§§233.20(a)(7) and 233.20(a)(3)(ii)(A) & (B) (A-42-43) require "$30 and 1/3" to be disregarded in determining "need and the amount of the assistance payment." 45 CFR §233.20(a)(7), Emphasis supplied.

From July 1974 to April 1975, the New York City Department of Social Services made errors resulting in AFDC overpayments to the McGraw family totaling $990.36.[3] "There is no dispute that the agency was responsible for this error, and no contention that Ms. McGraw in any way caused or even noticed the mistake." Second Circuit, opinion below (A-6). Upon realizing the error, the agency notified the petitioner that her family's AFDC payments would be suspended until the overpayment was recouped. The determination to recoup was upheld by Respondent Commissioner of the New York

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3. The overpayment provided each member of the McGraw family with a daily windfall of 31¢, unwittingly expended by the family during this period.

State Department of Social Services.

New York and HEW recoupment regulations distinguish between overpayments caused by recipient fraud and those not caused by recipient fraud. 18 NYCRR §352.31(d); 45 CFR §233.20(a)(12)(i). Fraudulently induced overpayments may be recouped by reduction of the AFDC grant whether or not the recipient still has the overpayment. Overpayments caused by agency or non-willful recipient error may not be recouped by grant reduction under these regulations unless the recipient still has the overpayment or other "available" income in excess of the level of the AFDC grant.

The challenged New York regulation, 18 NYCRR §352.31(d)(1)(ii), permits recoupment of agency caused overpayments by grant reduction when the recipient is working and a beneficiary of the "$30 and 1/3 disregard." The regulation defines the disregarded work incentive income as "currently available

income...., exclusive of the current assistance payment," and authorizes reduction of the assistance payments in amounts equal to all or part of the statutory disregard until the overpayment is recouped.

Recoupment has not been effected in petitioner's case. With respondents' consent, District Judge William C. Connor issued orders staying recoupment pending his determination of motions for summary judgment and thereafter pending determination of the appeal in the Second Circuit. Recoupment is presently stayed pending Supreme Court review by stipulation of all the parties.

Petitioner McGraw filed her complaint in the United States District Court for the Southern District of New York on September 25, 1975, seeking a declaratory judgment that the challenged regulation violated the Social Security Act and the equal protection and due process clauses of the Four-

teenth Amendment to the United States Constitution. Petitioner also sought an injunction against the regulation's enforcement. On September 25, 1975 petitioner moved for class certification and a preliminary injunction. In a memorandum and order dated February 25, 1976 and entered February 27, 1976, Judge Connor determined that petitioner's constitutional claims were substantial and that the court had jurisdiction under 28 USC §1343(3). Judge Connor granted summary judgment for respondents on petitioner's statutory claims and deferred convening a three-judge court to determine the constitutional claims pending review of the statutory decision. (A-17 - A-37). Judge Connor determined that all the requirements of Rule 23(a), (b)(2) F.R.C.P. had been fulfilled but declined to certify a class pursuant to F.R.C.P. Rule 23(c). (A-22).

Petitioner appealed from Judge Connor's order to the United States Court of Appeals

for the Second Circuit. In an order dated and entered July 2, 1976 that court affirmed the order of the district court. (A-38). Ms. McGraw's petition for rehearing was denied by the Second Circuit in an order dated and entered September 15, 1976. (A-40). This petition for certiorari was filed within 90 days thereafter.

REASONS FOR GRANTING THE WRIT

1. Recoupment of Non-Fraudulent AFDC Overpayments From Earnings Disregarded Pursuant To 42 U.S.C. §602(a)(8) Is Inconsistent With The Social Security Act and Congress' Mandatory Work Incentive Policy

In 1968, deeply concerned about mounting AFDC expenditures, Congress adopted a simple provision to give families totally relying on AFDC a monetary incentive to find and retain gainful employment. While allowing the States considerable latitude to set their own standards of need and

payment levels, Rosado v. Wyman, supra; Congress required that States allow working recipients to retain "$30 and 1/3" of their earnings above the level of payment made to otherwise identically situated unemployed recipients. Although the Second Circuit observed in this case that "the tangle of federal and state statutes and regulations in the welfare area now rivals the Internal Revenue Code and its attendant regulations as a marvel of complexity," (A-3), the earnings disregard provision is a model of simplicity in mechanism and purpose. It provides a mathematically precise monetary work incentive to all working AFDC recipients in all but specified circumstances.[4]

Shortly after passage of the earnings disregard, HEW promulgated clear and

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[4] 42 USC §§602(a)(8)(C)(i) & (ii) disqualifies from receiving the benefit of the disregard persons quitting work, voluntarily reducing earnings, and refusing employment without good cause.

unequivocal regulations requiring that "$30 and 1/3" of a working recipient's earnings be disregarded whenever "need" was determined or an AFDC payment made. In their present form these regulations are 45 CFR §§233.20(a)(7) and 233.20(a)(3)(ii)(A) & (B) (A-42 - A-43), the regulatory analogues of 42 USC §602(a)(8) and §602(a)(7).

The Courts have struck down State provisions deviating from the specific mandatory disregard formula of the Act. In X v. McCorkle, 333 F. Supp. 1109 (D.N.J. three-judge court, 1970), aff'd sub nom Engelman v. Amos, 404 U.S. 23 (1971), New Jersey's "administrative income ceiling", which provided a monetary incentive for recipients to work but departed from the statutory "30 and 1/3" formula, was invalidated. The three-judge district court carefully reviewed the legislative history of §602(a)(8) and concluded that each working recipient must be permitted to actually retain exactly

"$30 and 1/3" of his earned income above the state's AFDC payment level. 333 F. Supp. at 1115-1117. This Court affirmed in a unanimous per curiam opinion. Engelman v. Amos, supra.

The "$30 and 1/3 disregard" remained inviolate for all AFDC purposes until 1973, when it became entangled with the issue of recoupment and State demands that HEW give them broad powers to recover overpayments from recipients. Although petitioner here only contests the legality of overpayment recoupment from "disregarded" earnings, she notes that Title IV does not now, nor has it ever, contained any language permitting recoupment or any provision whatsoever for recovery of overpayments by reduction or suspension of AFDC payments.[5] Until 1967

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[5] This is in direct contrast to other Social Security Act programs, where Congress has specifically provided for recovery of overpayments by payment reduction. For example, such provisions are contained in the new Supplemental Security Income legislation

HEW issued no regulations permitting recoupment. In 1967 HEW entirely prohibited recoupment of previously expended AFDC overpayments. Handbook of Public Assistance Administration, Part IV, Section 3120 (April 10, 1967). In 1968, however, HEW changed its regulations to allow recoupment from AFDC grants for overpayments caused by recipient fraud. Handbook of Public Assistance Administration, Part IV, Section 3120 (June 20, 1968); 45 CFR §233.20(a)(3)(ii)(d), 34 Fed. Reg. 1394 (January 29, 1969). In 1973 HEW went further and promulgated a regulation which permitted recoupment of previously expended AFDC overpayments from current assistance payments, regardless of where culpability for the error lay. 45 CFR §233.20(a)(12), 38 Fed. Reg. 22010

at 42 USC §1383(b) and for the Title II OASDI programs programs at 42 USC §404. Furthermore, these titles contain provisions for waiver of recovery when, as in petitioner's case, the recipient was not at fault and the overpayment had already been unwittingly expended.

(August 15, 1973).[6] This regulation was invalidated in N.W.R.O. v. Weinberger, 377 F. Supp. 861 (D.D.C., 1974), in which the court held that recoupment of non-fraudulent previously expended overpayments violated the Act. Such recoupment was held violative of 42 USC §602(a)(7), which governs the "determination of need."

In retreat from the invalidation of its recoupment regulation, HEW adopted its current regulation, 45 CFR §233.20(a)(12)(i)(A)(1) (A-44), which prohibits recoupment of non-fraudulent overpayments, unless the recipient has "currently available income" "exclusive of the current assistance payment." Although the regulation itself is unclear, HEW has taken the position that the

6. "The amended regulation was issued at the request of many State welfare agencies and the National Council of State Administrators of the American Public Welfare Association, on behalf of all State welfare agencies." N.W.R.O. v. Weinberger, 377 F. Supp. 861, 864 (D.D.C., 1974).

"$30 and 1/3 disregard" is income "currently available" for recoupment, and thus permits the practice challenged in this case. (A-14). In addition, HEW has published a proposed regulation which clearly permits the challenged practice. Proposed 45 CFR §235.15 (b)(1)(ii)(A)(2), 41 Fed. Reg. 8067-8068 (Feb. 24, 1976) (A-45). The challenged New York regulation, like these HEW regulations, defines the "$30 and 1/3", which the Act makes unavailable in calculating "need" and the assistance payment, as "currently available income" "exclusive of the current assistance payment."

Thwarted by the federal courts in its attempt to facilitate recoupment, HEW seized upon the simple work incentive disregard procedure and reinterpreted it into a "marvel of complexity." (A-4) The simple truth for petitioner is that her family's AFDC payment could not be reduced but for the fact that Congress gave her a monetary

reward for working. Otherwise identically situated non-working recipients are immune from recoupment.

The district court recognized that the recoupment procedure constituted a failure to apply the disregard in the payment of assistance, but accepted respondents' argument that:

> ... in its recoupment of overpayments, the welfare agency does not "determine need" when it proceeds indirectly against the already-honored disregard by adjustment of the ultimate AFDC payment. (A-28).

The district court was simply wrong. 45 CFR §§233.20(a)(7) & 233.20(a)(3)(ii)(A) & (B) both interpret the Act as requiring the "$30 and 1/3" to be disregarded in calculating both "need" for and the amount of the ultimate assistance payment. HEW addressed this same fallacious "need -- payment" distinction in its brief amicus curiae to the Supreme Court in Engelman v. Amos, supra. ("Engelman amicus") HEW stated:

> New Jersey argues that Sections 402(a)(7) and (8) [42 USC §§602 (a)(7) and (8)] provide standards for use only "in determining need," and that its plan merely imposes a permissible reduction in benefit levels, after need has been determined. ... The Department believes that the asserted distinction between determining need and reduction of benefit levels is an artificial one. The regulations implementing Sections 402(a)(7) and (8), 45 C.F.R. 233.20, make no such distinction. They cover all aspects of financial eligibility for benefits, including the standards of assistance, the consideration of income and resources, applicable disregards of income and resources, and determination of the amount of payment. Engelman amicus pp. 7-8. (Emphasis added.)

In affirming the district court's order in this case, the Second Circuit also accepted the fallacious "need - payment" distinction. The court stated:

> The earned income disregard is required in determining an applicants need but New York's recoupment provisions only affect the amount of payment (A-10 - A-11). See also A-11, par. 2).

Even though it accepted this distinction between "need" and payment, fallacious in this

context, the Second Circuit was forced to admit

> ...that any use of the disregarded earnings to reduce the amount paid to a recipient detracts in some degree from the Congressional purpose of providing an incentive to AFDC recipients to seek employment,... (A-12).

However, the Court went on to balance the admitted infringement of Congressional policy against the State's claims of administrative convenience and necessity (A-13). The district court in X v. McCorkle, supra, forcefully demonstrated that such a balancing approach is inappropriate when interpreting this mandatory provision. The court stated:

> Rosado v. Wyman provides an analogous situation for interpreting a federal statutory requirement. The question in Rosado was whether New York had violated 42 USC §602 (23), the "cost of living" provision of the Social Security Act. Once the Court arrived at the meaning of the provision, the statute was strictly applied and New York's contentions of administrative convenience and efficiency were rejected. 333 F. Supp. at 1117.

Employing this improper balancing approach, the Second Circuit resolved what it characterized as a "close" issue in favor of a recoupment policy, which has no basis in the Act, over Congress' explicit and mandatory work incentive policy.

HEW and the courts below have asserted that the admitted nullification of Congressional work incentive policy, effected by the challenged practice, is sustainable because it is only a partial nullification effecting only part of the AFDC population, and because the work incentive policy must be balanced with other legitimate state interests. These assertions are factually and legally specious.

The challenged practice deprives a great number and percentage of the working poor of work incentive income that Congress mandated they have. Respondent's statistics for the period when Ms. McGraw's family received the agency caused overpayments show

an overpayment error in 29.6% of all AFDC cases in New York, with 43.1% of these overpayments due to agency error.[7] Extrapolation with respondents' statistics on the size and composition of New York's AFDC population[8] indicates that there will be agency caused overpayments in the families of 4,616 working mothers encompassing 16,804 recipients in any given six-month

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7. Eligibility Audit Report, July 1-December 31, 1974, New York State Department of Social Services, pp. 16, 28-34. The audit report for the period January 1-June 30, 1975 shows an agency error overpayment rate of 42%, for July 1-December 31, 1972, 56.9%, and for the most recent period, July 1-December 31, 1975, 46.3%. HEW analysis shows a national agency error overpayment rate of 45.7%. Quality Control Charts, Analysis of Eligibility and Income Payments in AFDC, SRS-73-21210 (January 19, 1973), Chart 9.

8. There are approximately 36,187 working AFDC mothers encompassing families with 131,720 recipients in New York. Characteristics of AFDC Families in New York State, January 1973, N.Y.D.S.S., Pub. No. 1188 (August, 1974).

period.[9] All of these working families are subject to recoupment under the challenged regulation. Nationally, this practice deprives hundreds of thousands of the working poor of work incentive income that Congress mandated they have.

The legislative history of §602(a)(8) shows that Congress expected the provisions to reduce both State and Federal AFDC expenditures by inducing people to work rather than rely completely on AFDC payments. If Congress was correct, an apparent saving effected by the challenged practice may well be more than offset as recipients respond to the implicit work disincentive.

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9. This does not include the recipients in families of other working AFDC recipients who are also entitled to the earnings disregard. Neither do these figures include overpayments resulting from non-willful recipient errors. HEW statistics show that there is evidence of fraud in less than one-half of 1% of all AFDC cases. Disposition of Public Assistance Cases Involving Questions of Fraud, HEW, SRS, NCSS Report E-7 (FN-72), (June 19, 1973), Table C.

In any event neither HEW nor the courts below should have substituted their judgment for that of the Congress.

2. HEW's Current Position Approving The Challenged Practice Is Not Entitled To Deference Because The Agency's Interpretation Is Inconsistent With The Act, Other HEW Regulations And HEW's Previous Interpretation of §602(a)(8)'s Mandate

The courts below deferred to an agency interpretation which was neither contemporaneous with the enactment of §602(a)(8) nor represented a long standing and consistent administrative interpretation. U.S. v. Nat. Ass'n. of Securities Dealers, Inc., 422 U.S. 694 (1975). When an agency has taken inconsistent positions and its interpretation is contrary to the statute, a court should not defer to it. See Morton v. Ruiz, 415 U.S. 199, 237 (1974); Espinoza v. Farah Mfg. Co., Inc., 414 U.S. 86 (1973); N.W.R.O. v. Weinberger, supra; N.W.R.O. v.

Mathews, 533 F.2d 637 (D.C. Cir. 1976). However, the courts below deferred to HEW's endorsement of the challenged practice without even fully understanding the agency's rationale for that support.

The district court's deference to the federal agency was so unreasoned that it could not discern which HEW regulation authorized the challenged practice.[10] To avoid similar confusion in the Second Circuit, petitioner requested that HEW file a brief amicus curiae. The court was aware of the agency's refusal of petitioner's request, but did not ask the agency to file an amicus brief.

HEW's newly adopted interpretation

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10. At A-29 the court sets out 45 CFR §233.20(a)(12)(i)(f) and characterizes it as HEW's "most pertinent" regulation on the issue. However, this regulation refers to recoupment in fraud cases. 45 C.F.R. §233.20(a)(12)(i)(A)(1) governs the challenged practice and was cited and briefed by petitioner at numerous stages of the district court proceedings.

that §602(a)(8) neither authorizes nor prohibits the challenged practice is set forth in its brief amicus curiae to the district court in Johnson v. Likins, No. 4-75-Civ.-318 (D. Minn., October 10, 1975), ("Johnson amicus") and is repeated in its memorandum of points and authorities to the district court in Swasey v. Whalen, No. 76-209 (D.N.H., November 29, 1976).[11] In Johnson, the district court has preliminarily enjoined a statewide regulation substantially identical to the challenged New York regulation. In Swasey, the HEW regulation authorizing the challenged practice and a New Hampshire regulation essentially identical to the challenged New York regulation were declared

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11. Counsel for petitioner inquired of the Clerk of the Supreme Court whether it was necessary to reproduce as appendices these two briefs, the two unreported decisions in Johnson and Swasey and the brief amicus curiae to the Supreme Court in Engelman v. Amos, all of which petitioner has cited to in this petition. The Clerk's office responded that this was neither necessary nor advisable.

invalid as contrary to 42 USC §§602(a)(7) and (8).

In the Johnson amicus, HEW exposes the erroneous bases of the decision below, reaffirming that §602(a)(8) income is neither "available" for determining "need" nor for determining the assistance payment. See 45 CFR §233.20(a)(3)(ii) (A-42). However, HEW dichotomizes the concept of "availability" asserting that disregarded earnings are available for recoupment purposes even though they are not available for purposes of determining "need" and payment. HEW's contention that recoupment is a separate process not affecting the assistance payment is a classic example of double-talk. The agency says, for example:

> Thus for the state to deduct the amount of the recoupment from the benefit check does not constitute a reduction in the amount of the grant. The income received which had been disregarded for purposes of determining the grant is available to the recipient in lieu of the amount recouped from the grant

> check to meet the need standard or portion thereof which the state has undertaken to provide. Johnson amicus, p. 6.

The agency further states that:

> for purposes of administrative convenience, the state has chosen to reduce the amount of the assistance check and to tell the recipient that the remainder of this assistance payment is located in the equivalent amount of the disregarded income that he already possesses. Johnson amicus, p. 14.

HEW directs the recipient to find the amount of money taken from her payment in her work incentive income which, the agency admits, could not be considered in computing that same AFDC payment. HEW converts a work incentive payment into a meaningless accounting procedure and justifies this blatant violation of Congressional will in terms of "administrative convenience." Even accepting, arguendo, HEW's contention that overpayment recoupment is a process

distinct from the payment of assistance,[12] it is nevertheless a process involving a "determination of need," and thus, the specified earnings must be disregarded. N.W.R.O. v. Weinberger, supra, explicitly decided that recoupment of a non-fraudulent overpayment embodies a determination of "need." 377 F. Supp. at 868. HEW's recoupment regulation was invalidated because it conflicted with §602(a)(7), the clause governing the "need" determination. The challenged recoupment is premised on a determination that the working recipient does not "need" the "30 and 1/3", which by definition must be disregarded in determining "need." §§602(a)(7) and (8). HEW admitted this in the Engelman amicus, stating:

> ...the court below was correct in concluding that [New Jersey's administrative income ceiling] embodies a recalculation of need in a manner forbidden by Section 402(a)(8) [42 USC §602(a)(8)]. ...It operates by considering a family's total resources, and embodies a judgment that it needs no more.... The point is that Congress has determined, for important reasons of public policy, that families earning income should have only a specified part of that income considered in determining their need for benefits. Engelman amicus, pp. 9-10.

HEW has simply reversed the interpretation of §602(a)(8)'s mandate that it offered to this Court in Engelman v. Amos, supra, and has adopted an interpretation violative of the spirit and letter of the statute and the Court's decision in Engelman. The agency's position was formulated in retreat from N.W.R.O. v. Weinberger, supra, and has continued a pattern of misinterpretation of "current availability" which the courts have had to rectify. See N.W.R.O. v. Mathews, 533 F.2d 637 (D.C. Cir. 1976);[13] Swasey v.

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12. The Second Circuit accepted this position stating that the challenged practice may be upheld because rather than a payment reduction it "arguably" constitutes a proceeding against the disregarded earnings effected by a "shorthand method." (A-11-12).

13. In N.W.R.O. v. Mathews, supra, the Court of Appeals invalidated 45 CFR §233.20

Whalen, supra.

The Second Circuit deferred to HEW's interpretation in what it characterized as "this highly complex and technical area" (A-13, see also A-10, par. 2). Failing to understand that the complexity they perceived in the issues was contrived by HEW to accommodate its inconsistent interpretations of §602(a)(8)'s mandate, the courts below simply abdicated their role of statutory interpretation in deference to HEW's position.[14].

(a)(3)(i) which treated resources as "currently available" according to their fair market value without regard to encumbrance. Thus, an AFDC family having $100 equity in a $2,000 item could be charged with having $2,000 in "currently available resources". This could in turn result in their AFDC grant being terminated for excess resources.

[14]. In Swasey v. Whalen, supra, the court criticized the deference granted to HEW by the Second Circuit in this case, stating:

> It was this policy that convinced the Second Circuit Court of Appeals to uphold the recoupment policy and regulations of New York State in a case which this one tracks in all essentials. McGraw v. Berger, 537 F.2d 719 (2d Cir. 1976).
>
> With all due respects to the Second Circuit Court of Appeals, I must point out that, in some instances, deference to the agency interpretation may result in contravening the Congressional intent and the basic policy of the statute. Swasey Decision, p. 6.

3. The Decision Of The Court Below Conflicts With The Two Other Federal Precedents, Resulting In The Inconsistent Administration Of The Act

The two other federal courts which have addressed the issues in this case have enjoined State recoupment regulations which authorized recoupment of previously expended non-fraudulent[15]. overpayments from one-half[16].

[15]. The Johnson case is limited to agency caused overpayments, and did not decide the issue with respect to non-willful recipient caused overpayments. Both the HEW and New York regulations draw the line of distinction between fraudulent and non-fraudulent overpayments. Agency caused and non-willful recipient caused overpayments are treated identically.

[16]. The New York and HEW regulations make the entire "disregard" available for recoupment.

of the "$30 and 1/3 disregard".[17] Johnson v. Likins, supra; Swasey v. Whalen, supra.

In Johnson, the district court reviewed the legislative history and mandatory language of §602(a)(8) and held that recoupment of disregarded earnings violates the statute when premised on the State's determination that "disregarded" income is not "needed" by the recipient. Furthermore, the court concluded that "Congress intended that the

[17] The courts below both dismissed reliance on Bradford v. Juras, 331 F.Supp. 167 (D. Ore. three-judge court, 1971). Bradford held that fraudulently induced overpayments (not at issue in this case) could be recouped from disregarded income, but only because it determined that §602 (a)(8) was not mandatory. The basis of the decision was later discredited by Engelman v. Amos. Bradford also held that recoupment below the level of the assistance payment violated the Act, even when overpayments were fraudulently induced. The leading state court case, Steere v. Minnesota, 243 N.W.2d 112 (Minn. 1976) similarly involves a recipient's willful failure to account for outside income. 243 N.W.2d at 124. In this fraud related situation the court permitted recoupment from the disregard, expressly disavowing any criticism of the statewide Johnson v. Likins federal litigation.

disregarded income be disregarded whenever a an AFDC payment is made". Johnson decision, p. 29.

In Swasey, the court characterized the instant case as "a case which this one tracks in all essentials," and criticized the Second Circuit for deferring to an HEW interpretation "contravening the Congressional intent and basic policy of the statute." Swasey decision, p. 6. The court found that the challenged recoupment constitutes a failure to disregard §602(a)(8) earnings "in the formula for determining need," and held that 45 CFR §233.20(a)(12)(i)(A)(1) violates 42 USC §§602(a)(7) and (8). Swasey decision, pp. 1, 9, 10.

The conflict of these decisions with those of the courts below means that the law is being administered under a dual system. In Minnesota and New Hampshire disregarded earnings are not available for recoupment, but such recoupment is permitted in all

other states. The conflict of decisions among courts in the First, Second, and Eighth Circuits and the inconsistent administration of the Act is a compelling reason for granting certiorari at this time.

4. When a District Court Determines That All The Requirements of F.R.C.P. 23(a),(b)(2) Have Been Fulfilled It Has No Power To Deny Class Action Certification

In denying petitioner's motion for class certification, the district court stated:

> As the parties were advised at their conference with this Court, the class action designation sought by plaintiff would constitute, at best, procedural surplusage. This is not to say that the Court entertains any doubt that plaintiff might adequately represent the interests of those welfare recipients who, like herself, are immediately and intimately affected by the recoupment of agency overpayments from earned income disregards. Nor does the documentation supplied by the parties leave any basis for questioning the numerosity of a class that would consist of plaintiff and others similarly situated with respect to the issues presently before the Court. (A-22-23).

The court's refusal to certify a class after it had determined that all the requirements of Rule 23(a), (b)(2) had been fulfilled was in accordance with the Second Circuit's holdings in Galvan v. Levine, 490 F.2d 1255, 1261 (2nd Cir. 1973) and Vulcan Society of N.Y. City Fire Dept. v. Civil Service Commission, 490 F.2d 387, 399 (2nd Cir. 1973).[18] These decisions permit the district court to deny class action status, in a 23(a), (b)(2) action, when it is deemed "unnecessary," because the court believes that individual declaratory and injunctive

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[18] In this case the Second Circuit affirmed the denial of class certification, stating that the issue was moot. The issue is not moot. The Second Circuit admitted that petitioner's constitutional claims are unresolved and must be determined by a three-judge court. (A-16, note 19.)

relief against a governmental body will automatically run to the benefit of all similarly situated in the purported class.

The Second Circuit's rule is in direct conflict with both the plain meaning and intent of Rule 23 and with the decision of the Seventh Circuit in Fujishima v. The Board of Education, 460 F.2d 1355, 1360 (7th Cir. 1972). There, in a 23(a), (b)(2) action, the Seventh Circuit stated, "If the prerequisites and conditions of F.R.C.P. 23 are met, a Court may not deny class status because there is no need for it." The conflict of the Second Circuit's rule with the decision of the Seventh Circuit is a compelling reason to grant certiorari at this time. Supreme Court Rule 19(1)(b).

Furthermore, in Sosna v. Iowa, 419 U.S. 393, 399 (1975) and Franks v. Bowman Transport Co. Inc., 424 U.S. 747 (1976), this Court held that mootness of the claims of named plaintiffs did not warrant dismissals

because of the interests acquired by the classes upon certification. Those decisions emphasized the importance of class certification and the timing of such determination. In this case, petitioner's purported class may well be prejudiced if during the pendency of this lengthy litigation her individual claim becomes moot. Depending on the disposition of this petition for certiorari, petitioner's constitutional claims may be brought to a three-judge court, whose decision is directly appealable to this Court. (A-16, note 19; A-37). Class certification is necessary to protect the interests of a class petitioner has a right to represent.

Since the district court determined that Rule 23(a), (b)(2)'s requirements were fulfilled, it had no power to deny class action status.

CONCLUSION

For all the foregoing reasons, petitioner Josephine McGraw prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on July 2, 1976.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1167—September Term, 1975.

(Argued June 11, 1976 Decided July 2, 1976.)

Docket No. 76-7102

JOSEPHINE MCGRAW, individually and on behalf of her minor dependent children and all persons similarly situated,

Plaintiffs-Appellants,

—against—

STEPHEN BERGER, individually and as Commissioner of the New York State Department of Social Services, JAMES DUMPSON, individually and as Commissioner of the New York City Department of Social Services, and THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES,

Defendants-Appellees.

Before:

FRIENDLY, FEINBERG and VAN GRAAFEILAND,

Circuit Judges.

Appeal from decision of United States District Court for the Southern District of New York, William C. Conner, *J.*, that 18 N.Y.C.R.R. § 352.31(d)(1)(ii), permitting defendants to recoup AFDC overpayments to plaintiffs caused by agency error out of earnings disregarded in

calculating plaintiffs' welfare needs pursuant to 42 U.S.C. § 602(a)(8)(A)(ii), is not inconsistent with that statute.

Affirmed.

LLOYD CONSTANTINE, Brooklyn, N.Y. (John C. Gray, Jr., Brooklyn Legal Services Corp. B, Brooklyn, N.Y., on the brief), *for Plaintiffs-Appellants.*

JUDITH A. GORDON, Assistant Attorney General (Louis J. Lefkowitz, Attorney General of the State of New York; Samuel A. Hirshowitz, First Assistant Attorney General; Rosalind Fink, Assistant Attorney General, on the brief), *for Defendants-Appellees.*

FEINBERG, *Circuit Judge:*

Josephine McGraw and her nine minor dependent children, recipients of public assistance benefits from New York State under the Aid to Families with Dependent Children (AFDC) program, appeal from a decision of the United States District Court for the Southern District of New York, William C. Conner, *J.*, granting summary judgment for defendants, various New York welfare officials.[1] Plaintiffs seek to invalidate a New York welfare regulation, 18 N.Y.C.R.R. § 352.31(d)(1)(ii),[2] which permits the

1 The defendants are the Commissioners of the New York State and New York City Departments of Social Services, and the New York State Department of Social Services. For convenience, we will refer to the defendants collectively as the State.

2 18 N.Y.C.R.R. §352.31(d) provides, in pertinent part:

(d) *Recoupment of overpayments.* (1) Except as provided in paragraph (2) of this subdivision, recoupment of overpayments of assistance including overpayments resulting from assistance paid pending a hearing decision shall be treated as follows:

State to recoup overpayments of welfare benefits caused by agency errors out of the portion of a recipient's earnings that is disregarded in calculating welfare needs under 42 U.S.C. § 602(a)(8)(A)(ii),[3] as inconsistent with that statute. For reasons set forth below, we affirm.

I

The tangle of federal and state statutes and regulations in the welfare area now rivals the Internal Revenue Code

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(i) Recoupment shall be limited to overpayments made during the 12 months preceding the month in which the overpayment was discovered.

(ii) Recoupment of any overpayment made to a recipient shall not be required unless the recipient has currently available income or resources, exclusive of the current assistance payment. Exempted income and disregards shall be considered as being currently available.

(2) Where overpayments were occasioned or caused by a recipient's willful withholding of information concerning his income, resources, or other circumstances which may have affected the amount of the public assistance payment, recoupment of prior overpayments from current assistance grants shall be made irrespective of current income and resources. In such cases, recoupment shall not be limited to overpayments made during the 12 months preceding the month in which the overpayment was discovered.

3 This statute requires state AFDC plans to

(8) provide that, in making the determination under clause (7), the State agency—

(A) shall with respect to any month disregard— . . .

(ii) in the case of earned income of a dependent child not included under clause (i), a relative receiving such aid, and any other individual (living in the same home as such relative and child) whose needs are taken into account in making such determination, the first $30 of the total of such earned income for such month plus one-third of the remainder of such income for such month (except that the provisions of this clause (ii) shall not apply to earned income derived from participation on a project maintained under the programs established by section 632(b)(2) and (3) of this title).

The reference to "clause (7)" is to 42 U.S.C. § 602(a)(7), set out in note 5 infra.

and its attendant regulations as a marvel of complexity. The issues involved in this case will perhaps be easier to understand if put in the context of the structure of the AFDC program, as it particularly affects the McGraw family.

The AFDC program, established under Title IV-A of the Social Security Act, 42 U.S.C. §§ 601-10, aims to provide financial assistance to needy dependent children and the adults who care for them. The program is financed in large part by federal funds on a matching basis, but is administered by the states, which have "broad discretion in determining both the standard of need and the level of benefits." *Shea* v. *Vialpando*, 416 U.S. 251, 253 (1974). State plans, however, must conform to the requirements laid down by the Social Security Act and the regulations of the Department of Health, Education and Welfare (HEW).

"Under HEW regulations all AFDC plans must specify a statewide standard of need, which is the amount deemed necessary by the State to maintain a hypothetical family at a subsistence level. Both eligibility for AFDC assistance and the amount of benefits to be granted an individual applicant are based on a comparison of the State's standard of need with the income and resources available to that applicant." Id. The "standard of need" set by New York Social Services Law § 131-a(2) for a family of ten is $284 semi-monthly, plus an allowance for shelter that, under the applicable New York regulations, amounts for the McGraws to $59 semi-monthly.[4] This total of $343 is then compared with the "income and resources" of the family, in this case Ms. McGraw's earnings from her job as a cook's helper in a day care center.

4 New York provides the actual amount of rent paid up to certain limits according to locality and family size. 18 N.Y.C.R.R. § 352.3(a).

Ms. McGraw earns $265.84 semi-monthly. Under 42 U.S.C. § 602(a)(7)[5] and 45 C.F.R. § 233.20(a)(3)(iv)(a), "expenses reasonably attributable to the earning of [this] income" must be deducted from this amount. In Ms. McGraw's case $49.77 is deducted under this provision. In addition, a further deduction, known as the "earned income disregard," is made. Under 42 U.S.C. § 602(a)(8)(A)(ii), the first $30 per month, and one-third of the remainder, of a working adult AFDC recipient's earnings are disregarded in calculating the family's "income and resources." This deduction amounts to $98.61 in Ms. McGraw's case.[6]

As already indicated, the amount of the assistance payment is based on the difference between the applicant's resources and the state's standard of need, 45 C.F.R. §§ 233.20(a)(2), (3), but the state is not required to pay the full amount, or any particular amount or percentage, of that "budget deficit." *Jefferson* v. *Hackney*, 406 U.S. 535, 541 (1972); *Rosado* v. *Wyman*, 397 U.S. 397, 408-09 (1970). However, since New York does currently pay 100 per cent of the standard of need, New York Social Services Law § 131-a(3); *Hagans* v. *Berger*, slip op. 3995, 3998 (2d Cir. June 2, 1976), the amount of assistance provided semi-monthly to Ms. McGraw and her family is $225.54, ar-

5 § 602(a)(7) requires state AFDC plans to provide, subject to § 602(a)(8), note 2 supra, that

> the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income.

6 The earned income disregard is not applied when the earned income exceeds the applicant's standard of need, unless the applicant received AFDC assistance at some time during the preceding four months. 42 U.S.C. § 602(a)(8)(D).

rived at as follows: $343 (the total standard of need) minus $117.46 (Ms. McGraw's earnings of $265.84 less $49.77 work-related expenses and $98.61 earned income disregard).

Not surprisingly, in the course of making this intricate calculation, the agency made an error resulting in an overpayment of $47.16 to the McGraws in each semi-monthly pay period for some ten months, for a total overpayment of $990.36. There is no dispute that the agency was responsible for this error, and no contention that Ms. McGraw in any way caused or even noticed the mistake.[7] In April 1975, the New York City Department of Social Services notified the family of the overpayment, and of its intention to recoup the loss. This determination was upheld by the State Department of Social Services after a hearing in August 1975.

The New York regulations concerning recoupment distinguish between errors caused by wilful withholding of information by a recipient and other errors. In the former case, 18 N.Y.C.R.R. §352.31(d)(2), see note 2 supra, permits recoupment from current assistance grants even if those grants are the recipient's only source of income. Thus, if a family comparable to the McGraws, with a state standard of need of $343 and no earnings or other resources, had wilfully misrepresented its circumstances so as to receive an additional $50 in aid, a state would be permitted under he regulation to reduce future grants below the level to which the family would otherwise be entitled until the amount overpaid was recovered.[8] When, how-

7 The state informs us that according to its surveys, about 42% of all overpayments are agency caused. Such agency-caused errors cost the state approximately $26.8 million in one six-month period.

8 The amount by which future grants could be reduced is limited by 18 N.Y.C.R.R. §352.31(d)(4), which provides:

> (4) The proportion of the current assistance grant that may be deducted for recoupment purposes shall be limited on a case-by-case basis so as not to cause undue hardship, and in no case shall exceed 10 percent of the household needs, and shall continue until such time as the excess payments have been recovered, except that where two or more recoupments are made simultaneously for different reasons or arising from different circumstances, the total reduction in the assistance grant shall not exceed 15 percent of the household's needs. In the event the amount required to be reduced hereby is greater than the amount of the current grant payments, such payments shall be withheld until the amount of the excess grants has been recouped.

ever, the error was not caused by the wilful misconduct of the recipient, recoupment from the grant itself has been held inconsistent with the Social Security Act. *National Welfare Rights Organization* v. *Weinberger*, 377 F. Supp. 861 (D.D.C. 1974). Accordingly, the applicable regulation permits recoupment only when "the recipient has currently available income or resources, exclusive of the current assistance payment." 18 N.Y.C.R.R. §352.31(d)(1)(ii). The regulation further provides that "Exempted income and disregards shall be considered as being currently available." Thus, in Ms. McGraw's case, the State sought to recoup its overpayment from the part of Ms. McGraw's earnings that was disregarded under 42 U.S.C. § 602(a)(8)(A)(ii) in calculating the amount of her family's AFDC grant.

This recoupment is effected by deducting $34.30 from each semi-monthly AFDC payment.[9] Thus, the McGraws'

9 The extent to which the New York regulations permit recoupment is unclear. Before us, the State takes the position that 18 N.Y.C.R.R. §352.31(d)(4), note 8 supra, applies to recoupment of agency-caused overpayments as well as of fraudulent ones, and indeed, in Ms. McGraw's case the amount of recoupment has been limited, in accordance with that regulation, to 10% of household needs, or $34.30 per semi-monthly check. On the other hand, the language of the regulation, which refers to recoupment from "the current assistance grant" can be interpreted as applying only to recoupment of overpayments caused by wilful recipient misconduct under §352.31(d)(2) ("recoupment . . . from current assistance grants"), and not to recoupment of innocent overpayments under §352.31(d)(1)(ii) (no recoupment from "the current assistance payment"). Plaintiffs point as well to an interpretive memorandum of

income for a given semi-monthly period consists of the reduced AFDC grant of $191.24 ($225.54 minus the recoupment amount of $34.30), plus her earnings of $216.07 ($265.84 minus $49.77 in work-related expenses), for a total of $407.31. The family thus has $64.31 more than the state standard of need, which they would receive if Ms. McGraw did not work. If it were not for the recoupment provisions, the family's total income would exceed the standard of need by $98.61, the full amount of the disregard.

II

This brings us, at last, to the crux of this lawsuit: whether the recoupment here conflicts with the earned income disregard provision of the Social Security Act. In the district court, plaintiffs argued that the State regulation, see note 2 supra, violates the Act in two ways. First, defining disregarded earnings as income "currently available" to replace the portion of the assistance payment withheld for recoupment is improper because those earnings must be disregarded in computing the amount of the assistance payment. Second, congressional intent that working AFDC recipients have additional income, in the exact amount of $30 plus one-third of the remainder of their earnings beyond that received by non-working recipients, is violated by recoupment of overpayments from that additional income.[10]

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the New York City Department of Social Services, I.M. # 16/75, which refers to the §352.31(d)(4) limitation only in the context of §352.31(d)(2) recoupment, and notes that while recoupment against Ms. McGraw has in fact been limited, the agency initially threatened her with broader recoupment. Since plaintiffs have only been subjected to the more limited recoupment, and argue that *any* recoupment against the earned income disregard is illegal, we do not have to resolve this problem.

10 Plaintiffs also argued that the regulation is unconstitutional. The district court held that these arguments were substantial enough to require a three-judge court, then proceeded to deal with the pendant statutory claims. See *Hagans* v. *Lavine*, 415 U.S. 528, 543-45 (1974).

On the first argument, Judge Conner ruled that plaintiffs confused the determination of need with the amount of the welfare payment. Congress only required the disregard of a portion of recipients' earnings "in making the determination under clause (7)," that is, "in determining need." 42 U.S.C. §§ 602(a)(8), (7); see notes 3 and 5 supra. But as the discussion of the AFDC program above indicates, a state is permitted to set the amount of the payment at a level less than need. Thus, the district court held that recoupment is a separate process affecting the amount of the assistance payment, and resort to the disregarded earned income in this process does not detract from the state's earlier compliance with the statutorily-required disregard of that income in calculating need.

As to the second argument, Judge Conner held that while Congress clearly required that states in determining need disregard exactly as much earned income as specified in the statute, *X* v. *McCorkle*, 333 F. Supp. 1109 (D. N.J. 1970), aff'd per curiam sub nom. *Engelman* v. *Amos*, 404 U.S. 23 (1971),

> the legislative history . . . nowhere bespeaks a congressional purpose to shield "$30 + ⅓" of earned income under all circumstances and against every State exigency.

The district court concluded that the New York recoupment procedure had a limited effect on the congressional purpose of providing work incentives to welfare recipients, while meeting a compelling state need to recover erroneous overpayments.

In addition to this analysis of plaintiffs' arguments, Judge Conner relied on HEW's support of defendants' position. Rejecting all of plaintiffs' contentions, the dis-

trict court held that the challenged State regulation does not violate the federal statute. This appeal followed.

III

In this court, plaintiffs essentially repeat the contentions made below. Their arguments and those of the State, outlined in more detail below, each represent important policies. On balance, however, we find the arguments of the State more convincing, particularly because its position is supported by the agency responsible for the execution of the complex federal statutory scheme.

There is considerable force to plaintiffs' claim that the State may not, consistently with the Social Security Act, define earned income that has been disregarded in calculating eligibility as "exclusive of" the current assistance grants and as "currently available" income apart from the AFDC payment. See note 2 supra. According to plaintiffs, it is irrational to say that the disregarded earned income is "exclusive of" the welfare payment when the disregard of that income is a necessary step in calculating the amount of the payment. Therefore, the State cannot permit recoupment of non-fraudulent overpayments from the disregarded earned income.

The State responds that this argument confuses the state standard of need with the amount of the payment.[11] As noted above, the states are free not only to set the standard of need under the AFDC program, but also to determine how much of an applicant's admitted need is to be met. States may set the amount of AFDC assistance at some percentage of need, or grant 100 per cent of need up to a certain dollar limit. The earned income

11 Such confusion is understandable in the case of New York, because it pays AFDC assistance at 100% of need, so that the two amounts are usually identical.

disregard is required in determining an applicant's *need*, but New York's recoupment provisions only affect the amount of *payment*. Therefore, the State argues, its recoupment regulations deal with an area the Social Security Act does not reach.

There is, however, a significant limitation to the State's argument. Surely, as the district court noted, a state may not calculate an applicant's *need* in accordance with the requirements of section 602(a)(8)(A)(ii), but circumvent these requirements by providing that AFDC *payments* will be limited, in the case of working recipients, to an amount equal to the calculated need minus the amount of the earned income disregard. Nevertheless, with that qualification in mind, the State is correct that its recoupment provisions are not literally reached by the federal statute. The statute does not deal with recoupment in any way, and by its terms requires the earned income disregard only in the calculation of need.[12] To this extent at least, the State's distinction between the calculation of need and the amount of the payment received by the recipient has validity. The New York regulation challenged here only utilizes the disregarded income in the context of recoupment, and does not circumvent the work incentive provisions of the statute by ignoring or limiting the earned income disregard for all AFDC payments.

Moreover, in this case, the State may plausibly argue that even the amount of the assistance *payment* is not being reduced. Although plaintiff's are correct that the check received by an AFDC recipient is smaller because of the recoupment, the State practice of reducing the

12 We note that income from certain other sources is subject to much broader disregard provisions. For example, Congress has provided that aid under the Food Stamp Act of 1964 "shall not be considered to be income or resources for any purpose under any Federal or State laws . . . ." 7 U.S.C. § 2016(c).

amount of the assistance check is the functional equivalent of paying the same amount of assistance and proceeding separately against the income earned by the recipient in order to recoup sums previously overpaid. Unlike the situation in such cases as *King* v. *Smith*, 392 U.S. 309 (1968), this earned income concededly[13] represents actual cash in plaintiffs' possession in excess of the standard of need, not merely supposed or hypothetical assets. Unless the legislative intent were clear, we would be reluctant to conclude that Congress intended to prohibit the State from attempting to recover its losses by attaching otherwise disregarded earnings of welfare recipients who owed it money. The State's recoupment procedure here is a shorthand method of reaching that result.

Plaintiffs argue that Congress intended every working AFDC recipient, including those from whom past overpayments are being recouped, to have exactly "$30 and ⅓" more than a similarly situated unemployed recipient. Certainly that was the amount of the work incentive that Congress provided, and a state may not provide a lesser amount. *X* v. *McCorkle*, supra. But the legislative history of the earned income disregard reveals only the general purpose of the provision, and gives no indication that Congress considered the impact of the disregard on recoupment. See, e.g., S. Rep. No. 90-744, 90th Cong., 1st Sess., 2 U.S. Code Cong. & Admin. News 2981-82, 2994-96 (1967).

Thus, the wording of section 602(a)(8)(A)(ii) does not specifically prohibit the utilization of disregarded earned income as a source of recoupment, and the legislative history indicates that Congress did not focus on the question. We must therefore consider the policies underlying the statute. Granted that any use of the disregarded earnings to reduce the amount paid to a recipient detracts in some

13 Reply Brief of Plaintiffs-Appellants, at 3-4.

degree from the congressional purpose of providing an incentive to AFDC recipients to seek employment, that does not end the inquiry. The underlying policies of the statute as a whole must also be considered. In this regard, the district court correctly pointed to the states' authority to set the amount of payment below the amount of need as evidence that

> The AFDC grant is . . . a function not only of the recipient's need, but also of the administrative imperatives that may be dictated by a State's limited fiscal resources.

In this case, the State argues that permitting recoupment out of disregarded earnings is a legitimate reconciliation of the policy of work incentives underlying the disregard with the State's need to protect its limited resources devoted to AFDC by recovering erroneous overpayments. The State's interest is great, and the impact on the work incentive is limited, because it is felt by a small proportion of recipients, and only for a limited period.

We find the State's arguments persuasive, but the issue remains a close one. *Cf. Johnson* v. *Likins*, No. 4-75-Civ-318 (D. Minn. Oct. 10, 1975).[14] In these circumstances, the position of HEW, as the federal administrative agency responsible for enforcing the provisions of the federal statute in this highly complex and technical area, seems to us particularly significant. Plaintiffs concede that HEW regulations permit the practice followed by New York. These regulations are not a model of clarity.[15] 45 C.F.R.

14 In *Johnson*, the court held, on a motion for a preliminary injunction, that Minnesota's recoupment regulations, analogous to the New York regulation challenged here, violated the Social Security Act.

15 Indeed, the court in *Johnson* v. *Likins* concluded that such a recoupment policy was contrary to the federal regulations. HEW has since

§ 233.20(a)(12)(i)(A)(1) provides that, as to non-fraudulent overpayments,

> (A) The State may not recoup any overpayment previously made to a recipient:
>
> (*1*) Unless the recipient has income or resources exclusive of the current assistance payment currently available in the amount by which the agency proposes to reduce payments:

This language does not speak directly to the critical issue in this case, which is whether the State may consider the earned income disregard as "income or resources exclusive of the current assistance payment currently available."

HEW, however, has clarified its position by actions subsequent to the adoption of this regulation. A department memorandum cited by defendants states that:

> In cases where the overpayment did not result from fraud or wilful withholding of information, this section of the regulation is interpreted to provide that a State welfare agency may recoup from any exempt income or resources that are available.[16]

Moreover, HEW submitted a brief amicus curiae to the court in *Johnson* v. *Likins*, supra, supporting the position of the state defendants in that case, whose regulation is similar to that challenged here. See note 15 supra. HEW has also authorized the parties to submit that brief to this court, presumably as an accurate statement of HEW's

filed an amicus brief in that case expressing the view that regulations permitting recoupment of earned income disregarded in calculating need are not in conflict with the federal statute or regulations.

16 Memorandum from James S. Wright, Jr., Administrator, Social and Rehabilitation Service, HEW, to Neil P. Fallon, Regional Commissioner, SRS, Boston, dated August 27, 1974.

views. Finally, HEW has proposed a new regulation, which quite clearly authorizes the challenged New York regulation, by permitting a state to define "income currently available" to "include . . . disregarded income." Proposed 45 C.F.R. § 235.15(b)(1)(ii)(A), 235.15(b)(2), 41 Fed. Reg. 8068 (Feb. 24, 1976).[17]

We agree with the State and the district court that when the agency entrusted with the execution of a federal statute has interpreted that statute, it is entitled to considerable deference. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). The Supreme Court has applied this rule to HEW interpretations of the Social Security Act. *New York Department of Social Services* v. *Dublino*, 413 U.S. 405, 421 (1973). As indicated above, we believe that HEW's position[18] is a reasonable one, which attempts to accommodate differing policies without doing violence to the congressional intent. Under all the circumstances, we con-

17 The proposed regulation provides:

> (b) *Conditions applicable to recoupment from current assistance.* (1) The State agency may recoup from current assistance payments: . . .
>
> (ii) On the State agency's initiative, without seeking the recipient's consent, only if:
>
> (A) The recipient has income exclusive of current assistance and of the income that was considered in determining the amount of such assistance. (i.e. countable non-exempt income) or resources, currently available in the amount by which the agency proposes to reduce assistance: . . .
>
> (2) For purposes of paragraph (b)(1)(ii)(A) of this section, the "income currently available" may include income set aside for future needs of a child or for carrying out a plan of rehabilitation, and disregarded income [with certain exceptions not here relevant.]

18 Although HEW's position is not yet clearly embodied in regulations, its consistent interpretation of the present regulation and the position it has taken in litigation, together with the regulation it has proposed, seem to us a sufficiently official expression of its interpretation of the statute to be entitled to deference.

clude that the challenged New York regulations does not conflict with the Social Security Act.[19]

The judgment of the district court is affirmed.

19 This disposition makes it unnecessary for us to decide whether the district court erred in refusing to certify a class action. Since summary judgment for the defendants was proper, the class action question is moot. If the action now proceeds to a three-judge court to consider plaintiffs' constitutional claims, plaintiffs may seek class action status in that forum.

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APPENDIX B

Josephine McGRAW, Individually and on behalf of her minor dependent children and all persons similarly situated, Plaintiff,

v.

Stephen BERGER, Individually and as Commissioner of the New York State Department of Social Services, et al., Defendants.

No. 75 Civ. 4682 (WCC).

United States District Court, S. D. New York.

Feb. 25, 1976.

Action was brought challenging New York State welfare regulation authorizing the State to recoup aid to families with dependent children grant overpayments from what is commonly denominated as earned income "disregard" where such overpayment is not occasioned by the recipient's willful act or omission. Plaintiff sought declaratory judgment as well as preliminary and permanent injunctive relief. The District Court, Conner, J., held that since plaintiff's constitutional claims were at least arguable the court had subject matter jurisdiction and could consider the pendent statutory claim, that the budget deficit and the ultimate AFDC grant are not functionally identical and that recouping the overpayment out of the earned income "disregard" was not in violation of provision of Social Security Act that in determining need a State is to disregard the first $30 and one-third of the remainder of earned income, especially since instant recoupment would

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cancel or reduce the effect of the disregard for only a limited period and would not thwart congressional intent in enacting the work incentive provision.

Order accordingly.

1. Courts ⇐101.5(4)

Since constitutional claims concerning New York regulations authorizing recoupment of aid to families with dependent children grant overpayments from earned income "disregard" were at least arguable, district court had subject matter jurisdiction and, hence, could consider pendent Social Security Act claim without convening a three-judge court unless the statutory claim proved not to be dispositive. Social Security Act, § 401 et seq., 42 U.S.C.A. § 601 et seq.; 28 U.S.C.A. § 1343(3).

2. Federal Civil Procedure ⇐181

Action challenging validity of New York regulation authorizing the state to recoup aid to families with dependent children grant overpayments from what is commonly denominated as an earned income "disregard" would not be certified for class action status since certification would add no force to the prospective effects of a declaratory judgment and could not serve to implement any meaningful retroactive relief in which members of such class might share. Social Security Act, § 401 et seq., 42 U.S.C.A. § 601 et seq.; Fed.Rules Civ.Proc. rule 23(c), 28 U.S.C.A.

3. Social Security and Public Welfare ⇐194

District court is without power to retroactively award welfare benefits, such as benefits in nature of aid to families with dependent children. Social Security Act, § 401 et seq., 42 U.S.C.A. § 601 et seq.

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4. Social Security and Public Welfare ⇐194

Although states have considerable latitude in allocating their aid to families with dependent children grant resources, in that each state is free to set its own standard of need and to determine the level of benefits, a participating state must abide by federal directive where Congress has chosen to speak in mandatory terms. Social Security Act, § 401 et seq., 42 U.S.C.A. § 601 et seq.

5. Social Security and Public Welfare ⇐194

An overpayment caused other than by fraud of a recipient of aid to families with dependent children cannot be recouped where to do so would reduce the family's means below the level of the family's standard of need. Social Security Act, § 401 et seq., 42 U.S.C.A. § 601 et seq.

6. Social Security and Public Welfare ⇐194

The budget deficit and the ultimate aid to families with dependent children grant are not functionally identical, although they may prove to be equivalent in amount; the budget deficit represents the "basis" of the AFDC grant only to the extent that the latter may not exceed one hundred per cent of the former, although the State may compute the grant as a lesser percentage of the budget deficit; the AFDC grant is thus a function not only of the recipient's need, but also of the administrative imperatives that may be dictated by a State's limited fiscal resources. Social Security Act, § 401 et seq., 42 U.S.C.A. § 601 et seq.

7. Social Security and Public Welfare ⇐194

Although a state may fix the aid to

families with dependent children grant at something less than one hundred per cent of the budget deficit, a state may not circumvent the mandate that in determining need it is to disregard the first $30 and one-third of the remainder of earned income simply by reducing the grant to reflect a systematic and automatic subtraction of such portions of earning income from the initially computed budget deficit; such operation would constitute in effect a redetermination of need without allowance for the disregard; to such extent, a state may not achieve by indirection what it is forbidden to accomplish directly. Social Security Act, §§ 401 et seq., 402(a)(7, 8), 42 U.S.C.A. §§ 601 et seq., 602(a)(7, 8).

8. Social Security and Public Welfare ⇐194

New York's recouping aid to families with dependent children grant overpayment, which was not occasioned by recipient's willful act or omission, from amount mandated by Social Security Act to be disregarded in determining need, i. e., the first $30 and one-third of the remainder of earned income, would not violate such earned income "disregard," especially where the recoupment cancelled or reduced the effect thereof for only a limited period and there was no thwarting of congressional intent in enacting the work incentive provision. Social Security Act, §§ 401 et seq., 402(a)(7, 8), 42 U.S.C.A. §§ 601 et seq., 602(a)(7, 8).

Brooklyn Legal Services Corp., Brooklyn, N. Y., for plaintiff; John C. Gray, Jr., Lloyd E. Constantine, Brooklyn, N. Y., of counsel.

Louis J. Lefkowitz, Atty. Gen. of N. Y., New York City, for defendants; Rosalind Fink, Asst. Atty. Gen., New York City, of counsel.

MEMORANDUM AND ORDER

CONNER, District Judge:

Plaintiff Josephine McGraw and her nine dependent children are recipients of public assistance benefits under the Aid to Families with Dependent Children (AFDC) program, 42 U.S.C. § 601 *et seq.* The individual defendants are public officials legally responsible for administration of the AFDC program in New York. AFDC is among the categorical assistance programs established under the Social Security Act and is financed by the Federal Government and participating States on a matching-fund basis.

The present action represents a challenge to the validity and continued enforcement of 18 New York Code of Rules and Regulations § 352.31(d)(1)(ii)[1] (the New York regulation). That challenge extends to so much of the New York regulation as authorizes the defendant New York State Department of Social Services (the State agency) to recoup a past AFDC grant overpayment—where such overpayment is not occasioned by the recipient's wilful act or omission—from what is commonly denominated as an earned income "disregard."

I.

[1] Alleging that the New York regulation stands in contravention of the Social Security Act and operates in derogation of due process and equal protection under the Fourteenth Amendment,

1. The New York regulation reads as follows:

"Recoupment of any overpayment made to a recipient shall not be required unless the recipient has currently available income or resources, exclusive of the current assistance payment. Exempted income and disregards shall be considered as being currently available."

plaintiff brought this suit for a declaratory judgment and preliminary and permanent injunctions pursuant to 28 U.S.C. §§ 2201 and 2202, Rules 57 and 65, F.R.Civ.P. and 42 U.S.C. § 1983. Because plaintiff's constitutional claims, whatever their ultimate merits, are at the least arguable, this Court concludes that it has subject matter jurisdiction under 28 U.S.C. § 1343(3) and therefore may consider the pendent statutory claim, *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), without need to convene a three-judge court unless the statutory claim proves not to be dispositive. *Hagans v. Lavine*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974).

At a pretrial conference addressed to plaintiff's motions for a temporary restraining order,[2] preliminary injunction, and class action certification, this Court determined that, in the absence of issues of material fact demanding an evidentiary hearing or trial, the parties' paper submissions would be treated as applications for summary judgment under Rule 56, F.R.Civ.P., allowing for plenary relief on the merits. The parties therefore were directed to file a statement of agreed facts pursuant to Rule 9(g) of the General Rules of this Court.

As the parties were advised at their conference with this Court, the class action designation sought by plaintiff would constitute, at best, procedural surplusage. This is not to say that the Court entertains any doubt that plaintiff might adequately represent the interests of those welfare recipients who, like herself, are immediately and intimately affected by the recoupment of agency overpayments from earned income disregards. Nor does the documentation supplied by the parties leave any basis for questioning the numerosity of a class that would consist of plaintiff and others similarly situated with respect to the issues presently before the Court.

2. At that conference, the Court ordered defendants temporarily restrained from recouping overpayments to the McGraw family from their earned income disregard.

[2, 3] Nonetheless, within the frame of the present case, certification of class action status would add no force to the prospective effects of a declaratory judgment and could not serve to implement any meaningful retroactive relief in which members of such a class might share: under the ruling of *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), this Court is without power to award welfare benefits retroactively. The Court thus declines to certify this action under Rule 23(c) F.R.Civ.P.

II.

For the sake of clarity, the issues involved in this action are, in the discussion that follows, raised in relief from the background of plaintiff's personal welfare case history. Mrs. McGraw and her family have received semi-monthly AFDC payments for an unspecified number of years. Unemployed when she first became an AFDC recipient, Mrs. McGraw secured a job as a cook's helper more than three years ago, an employment that she has retained to date. Throughout that same period, the McGraw family has continued to receive AFDC assistance as a supplement to Mrs. McGraw's earned income.

In the fixing of AFDC benefits to be paid to the McGraws, the key point of reference is the "standard of need," an amount calculated by the State to be necessary to sustain a family of the

McGraws' size; federal law itself neither prescribes the components nor targets the level of such standards. As the Supreme Court has recently observed,

> "Under [the] HEW regulations [that implement Title IV,] * * * [b]oth eligibility for AFDC assistance and the amount of benefits to be granted an individual applicant are based on a comparison of the State's standard of need with the income and resources available to that applicant. 45 C.F.R. § 233.20(a)(2)(i). The 'income and resources' attributable to an applicant * * * consist generally of 'only such net income as is actually available for current use on a regular basis * * * and only currently available resources.' 45 C.F.R. § 233.20(a)(3)(ii)(c). * * *. If, [after consideration of certain deductions and exemptions], the net amount of 'earned income' is less than the predetermined statewide standard of need, the applicant is eligible for participation in the program and the amount of the assistance payments will be based upon that difference. 45 C.F.R. § 233.20(a)(3)(ii)(a) and (c)." *Shea v. Vialpando*, 416 U.S. 251, 253–54, 94 S.Ct. 1746, 1750, 40 L.Ed.2d 120, 125 (1974).

The difference between the applicable standard of need and the AFDC recipient's "income and resources" is commonly referred to as the "budget deficit." When Mrs. McGraw became a wage earner, her family's own budget deficit was thereby affected in two ultimately measurable respects, in accordance with the commands of Section 402(a)(7) and (8) of the Social Security Act, 42 U.S.C. § 602(a)(7) and (8). The relevant portions of those clauses read as follows:

> "§ 602.
>
> (a) A State plan for aid and services to needy families with children must * * * (7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid * * *; (8) provide that, in making the determination under clause (7), the State agency—
>
> (A) shall with respect to any month disregard—
>
> * * * * * *
>
> (ii) in the case of earned income of a dependent child not included under clause (i), a relative receiving such aid, and any other individual * * * whose needs are taken into account in making such determination, the first $30 of the total of such earned income for such month plus one-third of the remainder of such income for such month * * *."

Thus, by operation of Section 402(a)(7), the McGraws' budget deficits—and the AFDC grants based upon them—have been necessarily reduced by the fact of an income regularly generated by Mrs. McGraw's employment. However, by force of Section 402(a)(8), the consequent reductions are, again necessarily, limited by the "$30 and ⅓" disregards.

At the end of April 1975, a notice from the New York City Department of Social Services (the City agency) advised the McGraw family that,

> "Your [semi-monthly] income from the period July, 1974 to present should have been $127.59, not $80.43 as previously budgeted. This resulted in $990.36 in overpayment for this period.
>
> [The New York regulation] permit[s] recoupment on amounts up to the total exempted income. Since your budget

deficit is less than your exempted income your case will be suspended for 13 issue[s] until this amount is recouped."

At Mrs. McGraw's request, the State agency held a "fair hearing" for review of the City agency's intended recoupment measures. In a decision rendered on August 6, 1975, defendant Berger announced the following determinations:

1) The McGraws had received, through agency error, an AFDC overpayment.

2) That overpayment could be recouped in accordance with federal law only if the McGraws had available income and/or resources in excess of their AFDC grant.

3) Plaintiff's "$30 and ⅓" disregard represented such excess income and thus was subject to recoupment under the New York regulation.

As a result of that decision, the City agency proceeded to reduce the McGraws' semi-monthly AFDC payments by "withholding" a portion of the earned income disregards; the agency's departure from its initial intention to suspend its payments to the McGraws remains, to date, unexplained.

Plaintiff now asks this Court to rule that, at least where overpayments have not been occasioned by the fraud of AFDC recipients, the earned income disregard established under Section 402(a)(8) stands beyond the reach of defendants' recoupment. Defendants for their part insist that a fair reading on the Social Security Act and a due deference to the policies of the Department of Health, Education and Welfare (HEW) compel the conclusion that the recoupment of disregards wholly comports with federal law.

III.

Viewed in the abstract, defendants' posture in this litigation commands a reasonable sympathy. By invoking the New York regulation at issue, defendants have sought no more than to retrieve for the unhappily finite public treasury monies received without entitlement. In drawing upon the earned income disregard for that purpose, defendants have looked to a source that, by definition, lies beyond the minimum standard established as necessary for the AFDC recipient's subsistence: in New York, AFDC grants are as a rule calculated to compensate for the recipient's entire budget deficit. Thus, even if reduced by an amount representing the full measure of the earned income disregard, such a grant would still raise the recipient to the level of his determined standard of need. Moreover, in effecting recoupments, defendants act under the State's regulatory admonition that "[t]he proportion of the current assistance grant that may be deducted for recoupment purposes shall be limited on a case-by-case basis so as not to cause undue hardship * * *." 18 N.Y.C.R.R. § 352.31(d)(4).

[4] Nevertheless, the present litigation cannot be put to rest by the mere recitation of defendants' salutary objectives. For, although "there is no question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits," *King v. Smith*, 392 U.S. 309, 318–19, 88 S.Ct. 2128, 2134, 20 L.Ed.2d 1118, 1126 (1968), it is just as certain that a participating State, under Title IV, must abide by federal directive where Congress has chosen to speak in mandatory terms. Thus, the New York

regulation may be permitted to stand only if it is consistent with the congressional mandate embodied in Section 402(a)(8), *i. e.*, that the first thirty dollars of an individual's earned income plus one-third of the remainder be disregarded in New York's "determination" of that individual's "need." See *X v. McCorkle*, 333 F.Supp. 1109 (D.N.J.1970), *affirmed sub nom. Engelman v. Amos*, 404 U.S. 23, 92 S.Ct. 181, 30 L.Ed.2d 143 (1971).

Analyzed in the abstract, defendants' argument that recoupment of overpayments from earned income disregards does not offend the literal import of Section 402(a)(8) exerts a considerable force. Thus, defendants assert, the statutory disregard extends—in terms—no farther than the bounds of a State's "determination of need," a determination that, according to defendants, involves no more than an identification of those who are eligible for AFDC benefits and a calculation of the AFDC family's budget deficit. Once having made such a determination in accordance with, *inter alia*, the earned income disregard prescribed by Section 402(a)(8), the State is thereafter free, defendants emphasize, to establish its own level of benefits and, consequently, to reduce below the budget-deficit figure the amount of assistance that an AFDC family will receive. *Jefferson v. Hackney*, 406 U.S. 535, 92 S.Ct. 1724, 32 L.Ed.2d 435 (1972); *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970); see *Rosado v. Wyman*, 397 U.S. 397, 413, 90 S.Ct. 1207, 1218, 25 L.Ed.2d 442, 456 (1970). Thus, defendants reason, in its recoupment of overpayments, the welfare agency does not "determine need" when it proceeds indirectly against the already-honored disregard by adjustment of the ultimate AFDC payment.

[5] Defendants concede that an overpayment caused other than by an AFDC recipient's fraud cannot be recouped where to do so would reduce an AFDC family's means below the level of that family's standard of need. See *National Welfare Rights Organization v. Weinberger*, 377 F.Supp. 861 (D.D.C.1974). Defendants urge, however, that the earned income disregard represents an available asset that—at least in New York—is in excess of the standard of need and thus is a proper source for recoupment.

Defendants' construction of Section 402(a)(8) is reinforced by the apparent support of HEW, the federal agency charged by statute with execution of the Social Security Act. To be sure, that support is not clearly reflected on the face of HEW's implementing regulations. Thus, the most pertinent of those regulations provides no more than that

> "[a]ny recoupment of overpayments permitted by paragraph (a)(12)(i)(a)(2) of this section [referring only to overpayments wilfully caused by AFDC recipients] may be made from available income and resources (including disregarded, set-aside or reserved items) or from current assistance payment or from both." 45 C.F.R. § 233.20(a)(12)(i)(f).

However, plaintiff herself represents that, in the wake of the decision in *National Welfare Rights Organization v. Weinberger, supra*, "consultation between attorneys for N.W.R.O. and H.E.W. indicated that H.E.W. allow[s] the practice challenged herein." Plaintiff's Supplementary Brief at 11. It may hardly be gainsaid that HEW's acknowledged alignment with defendants' position stands as a formidable hurdle for plaintiff's case, since "the construction of a statute by those charged with its execution should be followed unless there

are compelling indications that it is wrong." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381, 89 S.Ct. 1794, 1802, 23 L.Ed.2d 371, 384 (1969); see e. g., *New York State Department of Social Services v. Dublino*, 413 U.S. 405, 421, 93 S.Ct. 2507, 2516, 37 L.Ed.2d 688, 699 (1973); *Dandridge v. Williams*, *supra*, 397 U.S. at 481–82, 90 S.Ct. at 1160, 25 L.Ed.2d at 500; *Snell v. Wyman*, 281 F.Supp. 853, 868 (S.D.N.Y. 1968), *affirmed*, 393 U.S. 323, 89 S.Ct. 553, 21 L.Ed.2d 511 (1969).

Plaintiff in effect invites this Court to conclude that an initial deference to HEW's apparent construction of Section 402(a)(8) must inevitably give way to the alleged fact of "compelling indications" that the federal agency, with respect to the issues raised herein, is simply "wrong." Plaintiff notes in passing that this Court would not be the first to refuse to adopt a stance expressly or impliedly assumed by HEW. See, e. g., *Philbrook v. Glodgett*, 421 U.S. 707, 95 S.Ct. 1893, 44 L.Ed.2d 525, 43 U.S.L.W. 4702 (1975); *Carleson v. Remillard*, 406 U.S. 598, 92 S.Ct. 1932, 32 L.Ed.2d 532 (1972); *Townsend v. Swank*, 404 U.S. 282, 92 S.Ct. 502, 30 L.Ed.2d 448 (1971); *National Welfare Rights Organization v. Weinberger*, *supra*; *Gasaway v. McMurray*, 356 F.Supp. 1194 (S.D.N.Y. 1973).

This Court must nevertheless decline plaintiff's invitation. It does so notwithstanding the recent case of *Johnson v. Likens*, Civ. No. 4–75–318 (D.Minn.1975) (unreported decision), in which the District Court of Minnesota has ruled that the statutory disregard stands protected against recoupment of agency-caused overpayments. Admittedly, *Johnson* is

to date the case most squarely on point,[3] and thus its authority would ordinarily be persuasive. Nonetheless, *Johnson's* precedential value is seriously undermined by the clearly erroneous premises

3. Although the parties herein have cited numerous decisions addressed to the Social Security Act and involving actually available versus presumed income, recoupments from sources other than disregards in the case of fraud, and alternative methods of calculating budget deficits without strict application of the "$30 + ⅓"-of-earned-income formula, none of those decisions is particularly instructive on the issue presently before this Court. Nor does *Bradford v. Juras*, 331 F.Supp. 167 (D.Ore. 1971), in which Section 602(a)(8) was read in a light favorable to the position of defendants herein, provide a firm platform from which to launch analysis in this case: that reading was based upon the *Bradford* court's assumption—by now discredited—that State application of the disregard formula was not mandatory.

Plaintiff suggests that the decision in *Williams v. Lavine*, 77 Misc.2d 586, 353 N.Y.S.2d 340 (Sup.Ct. Nassau 1974), in which it was ruled that the disregard "is not to be applied towards needs that would otherwise be met by a public assistance grant, including a discretionary allowance for rent," *id.* at 345, serves to fix the analytic course in the present case. However, that ruling does no more than to reaffirm the principle that the disregard must be honored in the determination of an AFDC recipient's need.

It is something of a puzzlement that plaintiff has chosen to emphasize the *Williams* court's observation that "[t]he work incentive program and its "$30 + ⅓" exclusion in turn comes [sic] from the federal Social Security Act, 42 U.S.C. § 602(a)(8)(A)(ii), which mandates the "disregard" of this portion of earned income. * * *. It is a legislated reward for those individuals who alone assume the double burden of caring for children and a home and working to support both." *Id.* at 344–45. Such observation only marks the point at which this Court's analytic inquiry must begin; it by no means charts the destination of our ruling.

Defendants, in turn, have referred this Court to the Supreme Court of Nassau County decision in *In re De Luca v. D'Elia*, (October 21,

on which the *Johnson* court rested its decision.

Thus, for example, via a painstaking but somewhat strained analysis of HEW regulations, the *Johnson* court concluded that "HEW would appear not to allow recoupments from disregard income in cases of agency error or non-wilful recipient error." *Id.* at 35. As already indicated, it has been conceded that HEW's actual position is just the opposite.

Moreover, in its attempt to gauge the breadth of the Section 402(a)(8) reference to "determination of need," the *Johnson* court asserted that

> "The United States Supreme Court, in explicating § 602(a)(7) and the regulations which implement it, noted that the amount an applicant is paid is based on a § 602(a)(7) determination, and upon a determination of need. [Thus,]
>
> 'If * * * the net amount of "earned income" is less than the predetermined statewide standard of need, the applicant is eligible for participation in the program and the amount of the assistance payments will be based upon that difference. * * * *Shea v. Vialpando* * * *.'

The § 602(a)(7) operation is the operation by which the amount of the assistance payment is calculated. By saying in § 602(a)(8) that the income disregard shall not be considered in the (a)(7) determination, Congress was

1975). In that decision, the claim that the New York regulation conflicts with Section 402(a)(8) was peremptorily discounted as "without merit." However, the treatment of the recoupment/disregard issue in *De Luca* is so conclusory that this Court hesitates to invoke its support beyond citation.

> stating that the income shall be disregarded in determining the amount of the assistance payment." *Id.* at 29 (citations omitted) (emphasis added).

[6] Such reasoning obliquely reflects a basic misapprehension of the relation between the budget deficit and the ultimate AFDC grant. The two are not, as the *Johnson* court apparently assumed, functionally identical—although, as is currently true in New York, they may prove to be equivalent in amount. The budget deficit represents the "basis" of the AFDC grant only to the extent that the latter may not exceed one hundred per cent of the former, although the State may compute the grant as a lesser percentage of the budget deficit. The AFDC grant is thus a function not only of the recipient's need, but also of the administrative imperatives that may be dictated by a State's limited fiscal resources.

[7] This is not to say that the State may circumvent the disregard mandate simply by reducing the AFDC grant to reflect a systematic and automatic subtraction of "$30 + ⅓" of earned income from the initially computed budget deficit; such operation would constitute in effect a redetermination of need without allowance for the disregard. To that extent, this Court agrees with the observation in *Johnson* that the State may not achieve by indirection what it is forbidden to accomplish directly. See *Johnson v. Likens, supra*, at 29, 32.

However, I believe that the *Johnson* court read into Section 402(a)(8) more than Congress said or intended. Johnson's reading of the statute as saying that "$30 + ⅓" of earned income "shall be disregarded in determining the amount of the assistance *payment*," *id.* at 29 (emphasis added), goes too far. That section instead states only that this portion of the earned income should be

disregarded in determining the applicant's *need* which, as we have seen, may be equal to or greater than the assistance payment.

The *Johnson* court based its conclusion in part upon its reading of congressional intent, *i. e.*, that "the income disregard work incentive is absolutely essential to the total A.F.D.C. program- * * *." *Id.* at 32. It is indeed a familiar rule that, "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but [must] look to the provisions of the whole law and to its object and policy." *United States v. Heirs of Boisdore*, 49 U.S. 113, 122, 8 How. 113, 122, 12 L.Ed. 1009 (1850). Thus, how far the disregard mandate extends may be accurately gauged only after reference is made to the congressional intent that underlies the less-than-definitive language of Section 402(a)(8).

With reference to the legislative purpose, an earlier Court has observed that the statutory disregard

> "was intended as an incentive to welfare recipients to seek employment. It was part of a congressional effort made to ensure that an applicant not find it more advantageous to remain on welfare than to seek employment. The legislative history reveals a concern among the Congressmen that one of the stated goals of the [AFDC] program—'to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care'—was not being achieved.
>
> The Senate Finance Committee stated that disregarding some portion of earned income was essential to implement this objective. The Committee in its report explained: 'A key element in any program for work and training for assistance recipients is an incentive for people to take employment. If all the earnings of a needy person are deducted from his assistance payment, he has no gain for his effort.'
>
> * * * * * *
>
> The report continued to state that, 'the committee believes that this provision will furnish incentives for members of public assistance families to take employment and, in many cases, increase their earnings to the point where they become self-supporting.'" *X v. McCorkle, supra*, at 1116 (footnotes omitted).

It seems clear that Congress intended that, in the ordinary course of AFDC administration, the earned income disregard should be preserved to the wage earner, intact and undiminished, as a measured impetus to gainful employment. However, the legislative history retraced and recited above nowhere bespeaks a congressional purpose to shield "$30 + ⅓" of earned income under all circumstances and against every State exigency. In that silence, this Court is left to the guidance of the statutory language as it is informed by "those common-sense assumptions that must be made in determining direction without a compass," *Rosado v. Wyman, supra*, 397 U.S. at 412, 90 S.Ct. at 1218, 25 L.Ed.2d at 455.

[8] If, in the process of recoupment, the State's resort to the disregard as an asset "in excess of need" were, as plaintiff urges, a *per se* "determination of need" and hence invalid under Section 402(a)(8), the State would be reduced to the status of a creditor peculiarly disabled from recovering against a debtor who by definition is able to repay. Com-

mon sense inexorably directs this Court to assume that Congress would not have settled on such result without having engaged in at least some evidenced debate or without projecting that intent via clear statutory directive. In the absence of such markings of an extra-ordinary legislative will, common sense further compels this Court's conclusion that Congress did not intend Section 402(a)(8) to disallow the limited sacrifice of "$30 + ⅓" of earned income for the compelling sake of overpayment recoveries[4] and a consequently fair apportionment of the limited AFDC funds.

Certainly, as it is applied in the present case, in which the recoupment cancels or reduces the effect of the disregard for only a limited period, there is no destruction of the work incentive, but only a temporary diminution or suspension thereof, and thus no thwarting of congressional intent. It would be easy to imagine more voracious recoupment practices which would effectively kill incentive, but we need not borrow trouble by imagining evils[5]; we need only rule

4. Whether such recapture of amounts owed to the State conforms with due process, *i. e.*, whether due process demands that the State be limited to the ordinary creditor recourse to civil action or garnishment, is beside the present point and beyond this single-judge court's cognizance.

5. The Johnson court's reluctance to sanction recoupment from disregards was in no small measure derived from the assumption that

> "if Minnesota [which provides grants in full satisfaction of recipients' needs] is free to recoup from disregard income in these circumstances, so is a State paying less than need. In such a State, disregard income may be the only resource which allows an A.F.D.C. family to rise to the level of minimum subsistence and recoupment from 'excess' income might be recoupment from the mouths of hungry children." *Johnson v. Likens*, *supra*, at 36.

Neither that reluctance nor that assumption, however, was warranted, in the light of the ruling in *National Welfare Rights Organization v. Weinberger*, *supra*, and HEW regulations' subsequent conformity therewith. See p. 1047 *supra*.

Moreover, there is something to be said for the no-less-humanitarian concern that, bowed by — and bowing to fiscal realities, a State foreclosed from such recoupments might well be obliged to depart from a policy of granting AFDC payments in full satisfaction of need, in which case "hungry mouths" would constitute the rule, rather than the exception.

upon the case at hand and upon the particular regulation under challenge.

The Court is impelled to rule that the New York regulation does not offend the Social Security Act. Whether the regulation can survive plaintiff's remaining constitutional challenges must be left to the determination of a three-judge court, whose convention must await the appeal of this ruling.[6]

SO ORDERED.

6. In *Taylor v. Lavine*, 497 F.2d 1208, 1214 (2d Cir. 1974), reversed on other grounds *sub nom. Van Lare v. Hurley*, 421 U.S. 338, 95 S.Ct. 1741, 44 L.Ed.2d 208 (1975), the Second Circuit observed that "[w]here the constitutional claim is sufficient to vest the district court with jurisdiction, it is proper for a single judge to decide the statutory question under pendent jurisdiction * * * and, if he sustains it, to defer requesting a three-judge court under 28 U.S.C. § 2281, pending review." (Citation omitted).

APPENDIX C

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of July one thousand nine hundred and seventy-six.

Present: HON. HENRY J. FRIENDLY

HON. WILFRED FEINBERG

HON. ELLSWORTH A. VAN GRAAFEILAND,

Circuit Judges,

Josephine McGraw, individually and on behalf of her minor dependent children and all persons similarly situated, Plaintiff-Appellant v. Stephen Berger, individually and as Commissioner of the New York State Department of Social Services, James Dumpson, individually and as Commissioner of the New York City Department of Social Services, The New York State Department of Social Services, Defendants-Appellees.	76-7102

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellants.

A. DANIEL FUSARO,
Clerk

by: /s/ Vincent A. Carlin
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

FILED

JUL 2 1976

A. DANIEL FUSARO, CLERK

APPENDIX D

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Present:

HON. WILFRED FEINBERG,

HON. ELLSWORTH A. VAN GRAAFEILAND

HON. HENRY J. FRIENDLY,

Circuit Judges.

JOSEPH MCGRAW, individually and on behalf of her minor dependent children and all persons similarly situated, Plaintiff-Appellant v. STEPHEN BERGER, individually and as Commissioner of the New York State Department of Social Services, JAMES DUMPSON, individually and as Commissioner of the New York City Department of Social Services, THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, Defendants-Appellees	Docket No. 76-7102

A petition for a rehearing having been filed herein by counsel for the plaintiff-

appellant, JOSEPH MCGRAW,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. Daniel Fusaro
A. DANIEL FUSARO,
Clerk

by /s/ Vincent A. Carlin
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

FILED

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A. DANIEL FUSARO, CLERK

APPENDIX E

45 CFR §§233.20(a)(3)(ii)(A) and (B):

(a) Requirements for State Plans:

A State Plan for...AFDC...must, as specified below:

(3) Income and resources; ...

(ii) Provide that, in determining need and the amount of the assistance payment, after all policies governing the reserves and allowances and disregard or setting aside of income and resources referred to in this section have been uniformly applied:

(A) in determining need, all remaining income and resources shall be considered in relation to the State's need standard;

(B) in determining financial eligibility and the amount of the assistance payment, all remaining income and resources may, at the State's option,

be considered in relation to the State's need standard, or the State's payment standard;

45 CFR §233.20(a)(7)(i):

(a) Requirements for State Plans.

A State Plan for...AFCD...must, as specified below:

(7) Disregard of earned income; method. (i) Provide that the following method will be used for disregarding earned income: The applicable amounts of earned income to be disregarded will be deducted from the gross amount of "earned income," and all work expenses, personal and non-personal, will then be deducted. Only the net amount remaining will be applied in determining need and the amount of the assistance payment.

45 CFR §233.20(a)(12)(i)(A):

(a) Requirements for State Plans.

A State Plan for...AFDC...must, as specified below:

(12) Recoupment of overpayments and correction of underpayments. Specify uniform Statewide policies for:

(i) Recoupment of overpayments of assistance, including certain overpayments resulting from assistance paid pending hearing decisions.

(A) The State may not recoup any overpayment previously made to a recipient:

(1) Unless the recipient has income or resources exclusive of the current assistance payment currently available in the amount by which the agency proposes to reduce payments: except that,

(2) Where such overpayments were

occasioned or caused by the recipient's willful withholding of information concerning his income, resources or other circumstances which may affect the amount of payment, the State may recoup prior overpayments from current assistance grants irrespective of current income or resources.

Proposed 45 CFR §235.15(b)(1)(ii)(A)(2):

§235.15 Recoupment of overpayments; State plan requirements and options.

A State plan under title. . . IV-A . . . of the Social Security Act must specify uniform Statewide policies on recoupment of overpayments of assistance, as defined in §205.40 of this chapter.

(b) Conditions applicable to recoupment from current assistance.

(1) The State agency may recoup from

current assistance payments:

(ii) On the State agency's initiative, without seeking the recipient's consent, only if:

(A) The recipient has income exclusive of current assistance and of the income that was considered in determining the amount of such assistance, (i.e. countable non-exempt income) or resources, currently available in the amount by which the agency proposes to reduce payments;. . .

(2) For purposes of paragraph (b) (1) (ii) (A) of this section, the "income currently available" may include income set aside for future needs of a child or for carrying out a plan of rehabilitation, and disregarded income except for income disregarded pursuant to §233.20(a)(4)(ii)(a),(d),(f) and (i) of this chapter, which are not available for recoupment under specific

language of the respective statutes.

(d) Later recovery. Where recoupment under paragraph (b)(1)(ii)(A) of this section is not possible at the time the overpayment becomes known, the State agency may recoup later, when income or resources become available. (Emphasis added) 41 Fed. Reg. 8067-8068, Feb. 24, 1976

Federal Rules of Civil Procedure 23(a),(b)(2)

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will

fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * *

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

* * *